

ARKANSAS SUPREME COURT

No. CR 06-45

NOT DESIGNATED FOR PUBLICATION

Opinion Delivered May 4, 2006

WILLIE HOUSTON
Appellant

PRO SE APPELLANT'S MOTION TO
FILE BELATED REPLY BRIEF
[CIRCUIT COURT OF PULASKI
COUNTY, CR 88-474, HON. JOHN W.
LANGSTON, JUDGE]

v.

STATE OF ARKANSAS
Appellee

APPEAL DISMISSED; MOTION MOOT

PER CURIAM

In 1988, appellant Willie Houston was found guilty by a jury of murder in the first degree and sentenced as a habitual offender to a term of ninety-nine years' imprisonment. This court affirmed the conviction. *Houston v. State*, 299 Ark. 7, 771 S.W.2d 16 (1989). Appellant subsequently filed a petition pursuant to Criminal Procedure Rule 37.1 challenging the judgment, which we denied. *Houston v. State*, CR 88-194 (Ark. December 10, 1990) (*per curiam*). In 2003, appellant filed in the trial court a *pro se* petition for writ of *habeas corpus* pursuant to Act 1780 of 2001, codified at Ark. Code Ann. § 16-112-201-207 (Supp. 2003). The trial court denied the petition without a hearing and we affirmed. *Houston v. State*, CR 04-552 (Ark. June 9, 2005) (*per curiam*).

In 2005, appellant filed a *pro se* petition to vacate and set aside the judgment pursuant to Act 1780 of 2001. The trial court denied the petition, and appellant has lodged an appeal in this court from that order. Currently before us is appellant's *pro se* motion to file a belated reply brief. We need not consider the motion as it is apparent that appellant could not prevail in this appeal if it were

permitted to go forward. This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward when it is clear that the appellant could not prevail. *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (*per curiam*); *Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (*per curiam*); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (*per curiam*). Accordingly, the appeal is dismissed, and the motion is moot.

In 1988, Eddie Bell was shot and killed by an assailant who knocked on his front door. Before going to the door, Bell placed a gun in his pocket and another gun in his waistband. Bell exchanged shots with the assailant before his death. Later, appellant was found in the parking lot of the University of Arkansas Medical Center with gunshot wounds. Appellant claimed that he had been jogging the night of Bell's murder and came upon men who demanded money, and shot him when he refused to comply.

A bullet and a bullet fragment retrieved from appellant during surgery matched a .38 Colt Diamond Back revolver found next to Bell. Yolanda Washington, who had been at Bell's home the night of the shooting, identified the gun as belonging to Bell. Other bullet fragments removed from appellant did not match this gun.

In his petition to vacate, appellant argued that the trial court erred in finding that some of the bullet fragments matched Bell's revolver, and further claims that "forensic DNA testing and all other tests, which may have become available through advances in technology [will] demonstrate [appellant's] actual innocence." Appellant's theory is that prior to the murder, a person later present at Bell's home also assaulted appellant during his jog, which explains how bullets from Bell's gun were removed from appellant's thigh during surgery.

The trial court denied appellant's prior petition for writ of *habeas corpus* pursuant to Act

1780 due to appellant's failure to list the items to be tested. In the instant case, appellant listed the items to be tested as the .38 caliber revolver, shotgun shells, bullets and bullet fragments. However, the trial court denied the instant petition as appellant failed to prove how testing certain items would support his claim of innocence.

Act 1780 of 2001 provides that a writ of *habeas corpus* can issue based upon new scientific evidence proving a person actually innocent of the offense or offenses for which he or she was convicted. See Ark. Code Ann. §§ 16-112- 103(a)(1), and 16-112-201--207 (Supp.2003)¹; *see also Echols v. State*, 350 Ark. 42, 44, 84 S.W.3d 424, 426 (2002) (*per curiam*). There are a number of predicate requirements that must be met under Act 1780 before a circuit court can order that testing be done. *See* sections 16-112-201 to -203. The act requires a *prima facie* showing of identity as an issue at trial when a petitioner contends that he is entitled to post-trial scientific testing on the ground of actual innocence. Section 16-112-202(b)(1); *Graham v. State*, 358 Ark. 296, ____ S.W.3d ____ (2004) (*per curiam*).

Contrary to appellant's contentions, the testimony at trial positively identified some of the bullet fragments recovered from appellant as coming from Bell's gun. Further, the trial court held that the presence of another person at the scene of Bell's murder may show that there may have been additional unknown assailants, but the presence of such unknown person would not alter the evidence that led to appellant's conviction, i.e., that appellant was shot by Bell during the incident. Moreover, another person's presence does not establish appellant's innocence.

The circuit court correctly found that appellant failed to demonstrate how testing would do

¹Appellant filed his petition prior to the enactment of Act 2250 of 2005 with an effective date of August 12, 2005, that amended portions of the relevant statute.

anything to advance his claim of innocence. It is clear on the record that appellant will not prevail, and we accordingly dismiss the appeal. The motion is moot.

Appeal dismissed; motion moot.